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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Federal Trade Commission,

10 Plaintiff,

11 v.

12 James D Noland, Jr., et al.,

13 Defendants.
14

No. CV-20-00047-PHX-DWL

ORDER

15 Pending before the Court is the FTC’s motion to modify the asset freeze. (Doc.
16 598.) For the following reasons, the motion is granted.

17 **RELEVANT BACKGROUND**

18 During the early stages of this FTC enforcement action, the Court issued a
19 preliminary injunction that, among other things, instituted an asset freeze as to Defendants
20 James D. Noland, Jr., Lina Noland, Scott Harris, and Thomas G. Sacca (together, the
21 “Individual Defendants”). (Doc. 109 at 5-6.) Pursuant to the asset freeze, the Individual
22 Defendants were enjoined from “[t]ransferring, liquidating, converting, encumbering,
23 pledging, loaning, selling, concealing, dissipating, disbursing, assigning, relinquishing,
24 spending, withdrawing, granting a lien or security interest or other interest in, or otherwise
25 disposing of” certain assets. (*Id.*) The preliminary-injunction order also included a related
26 section entitled “Duties of Asset Holders And Other Third Parties.” (*Id.* at 6-7.) Among
27 other things, it provided that any third-party business entity or person with actual notice of
28 the order who held or controlled any asset owned or controlled by any Individual Defendant

1 was required to “prohibit the withdrawal, removal, alteration, assignment, transfer, pledge,
2 encumbrance, disbursement, dissipation, relinquishment, conversion, sale, or other
3 disposal of any such [asset] . . . except by further order of this Court.” (*Id.* at 7.)

4 On September 18, 2023, following a bench trial, the Court issued a final order of
5 permanent injunction and monetary judgment as to the Individual Defendants. (Doc. 592.)
6 The monetary judgment consists of an award of \$7,306,873.14 against three of the four
7 Individual Defendants (James D. Noland, Jr., Scott Harris, and Thomas Sacca), jointly and
8 severally; an award of \$6,829 against all four Individual Defendants, jointly and severally;
9 and a clarification that the latter award “is part of, and not in addition to,” the former award.
10 (*Id.* at 17.) Additionally, the final order clarifies that “[t]he asset freeze imposed on
11 Individual Defendants pursuant to the . . . Preliminary Injunction (Lead Action, Doc. 109)
12 is hereby modified to the extent necessary to permit Individual Defendants to satisfy, in
13 whole or in part, the Judgment imposed [against them]. Upon full satisfaction of the
14 Judgment, the FTC shall make a full report of satisfaction, at which time the Court, upon
15 review and approval of the report, shall dissolve the asset freeze.” (*Id.* at 18.)

16 That same day, the Court entered judgment. (Doc. 596.)

17 On November 2, 2023, the FTC filed the pending modification motion. (Doc. 598.)
18 In a nutshell, the FTC explains that “[s]ecured creditors and lien holders have contacted
19 the FTC with concerns that the Court’s asset freeze may prevent them from exercising their
20 rights to [the Individual] Defendants’ real and personal property assets that serve as
21 collateral. Specifically, the asset freeze prevents Defendants’ creditors from selling or
22 otherwise disposing of Defendants’ assets in which those creditors have a security interest.
23 Because the FTC’s unsecured judgment interest cannot trump creditors’ secured interests
24 perfected before the initiation of this action, the asset freeze also prevents the FTC from
25 collecting on its judgment.” (*Id.* at 2.) The FTC argues that “[r]ather than requiring each
26 creditor seek to modify the asset freeze to exercise their interests, the FTC proposes the
27 Court modify the asset freeze to allow creditors to enforce their rights against Defendants’
28 assets in the same way they could do so absent the asset freeze. The FTC originally sought

1 the asset freeze to protect its ability to collect on an eventual judgment. The proposed relief
 2 maintains this aspect of the freeze by maintaining a freeze on any net proceeds that
 3 otherwise would go to Defendants after a creditor disposition of property. To promote
 4 efficiency and avoid burdening the Court, the FTC proposes creditors be able to obtain its
 5 written approval prior to exercising their rights against Defendants' collateral. With such
 6 approval, creditors exercising their rights would be deemed not to violate the asset freeze
 7 by doing so. Creditors will remain able to seek relief separately from the Court should they
 8 instead chose to do so." (*Id.* at 2-3.)

9 On November 15, 2023, the Individual Defendants filed an opposition to the FTC's
 10 modification motion. (Doc. 599.) The Individual Defendants argue the motion should be
 11 denied because (1) "the FTC's generalized conclusory statements regarding 'concerns' by
 12 unidentified creditors made at some prior unidentified time is unsupported hearsay and
 13 insufficient to support amendment of the order"; (2) "the FTC lacks standing to make
 14 claims for financial institutions who may or may not be seeking relief from the asset
 15 freeze"; and (3) "nor is there any consideration by the FTC as to whether these vehicles are
 16 subject to exemption or claims by a spouse." (*Id.* at 1-2.) Alternatively, the Individual
 17 Defendants argue that "[i]f the Court ultimately unfreezes the homes, . . . the Court [should]
 18 allow Defendants to sell the homes and deposit the net proceeds of sale in the Clerk of the
 19 Court registry pending further court order." (*Id.* at 2.)

20 On November 17, 2023, the Individual Defendants filed a notice of appeal. (Doc.
 21 601.)

22 On November 21, 2023, the FTC filed a reply in support of its modification motion.
 23 (Doc. 602.) The FTC characterizes the Individual Defendants' response as an attempt "to
 24 let them use the Court's asset freeze to shield them from their other creditors" and urges
 25 the Court to "not countenance such misuse of the freeze." (*Id.* at 1.) As for the standing
 26 objection, the FTC argues that "it was the FTC who sought the freeze in the first place.
 27 Surely, a party can ask the Court to relax an order that the party itself sought. The FTC
 28 sought the freeze to preserve funds to be returned to Defendants' victims; because,

1 however, the FTC will not be able to recover those funds ahead of third parties holding
2 perfected, prior-in-time secured claims, the FTC does not want to unduly burden those third
3 parties. In any event, the modification is plainly within the Court’s ‘broad equitable
4 powers.’” (*Id.* at 1-2.) As for the objection that the request is too vague, the FTC responds
5 that “specify[ing] individual pieces of property affected by the freeze . . . is unnecessary
6 and impractical. The freeze itself is broad and general. The FTC seeks a change that
7 encompasses the breadth and generality of the freeze.” (*Id.* at 2.) Finally, as for the
8 Individual Defendants’ alternative request for a stay, the FTC argues that “even if the Court
9 stayed execution of the FTC’s monetary judgment, that is no reason to shield Defendants
10 from their other creditors.” (*Id.*)

11 On November 22, 2023, the Court issued an order soliciting supplemental briefing
12 from the FTC on the jurisdiction-divesting effect, if any, of the Individual Defendants’
13 notice of appeal. (Doc. 603.)

14 On December 5, 2023, the FTC filed a supplemental brief on that topic. (Doc. 605.)
15 The FTC argues that the Court retains jurisdiction under Rule 62(d) and elaborates:
16 “Because certain of Individual Defendants’ creditors have claims to the Individual
17 Defendants’ assets that are superior to those of the FTC, the FTC (the party being protected
18 by the asset freeze) has asked the Court to loosen the freeze so as to allow those creditors
19 to collect their debts. This plainly does not change the status quo in any meaningful way,
20 nor does it ‘materially alter’ Individual Defendants’ appeal.” (*Id.* at 3.)

21 ANALYSIS

22 The Court agrees with the FTC, both as to existence of continued jurisdiction and
23 as to the propriety of the requested relief.

24 As for the former issue, the Ninth Circuit has explained that “[o]nce a notice of
25 appeal is filed, the district court is divested of jurisdiction over the matters being appealed.
26 This rule is judge-made; its purpose is to promote judicial economy and avoid the
27 confusion that would ensue from having the same issues before two courts simultaneously.
28 The principle of exclusive appellate jurisdiction is not, however, absolute. The district

1 court retains jurisdiction during the pendency of an appeal to act to preserve the status quo.
 2 This exception to the jurisdictional transfer principle has been codified in [Rule 62(d)]¹ of
 3 the Federal Rules of Civil Procedure, which allows a district court to ‘suspend, modify,
 4 restore, or grant an injunction during the pendency of the appeal upon such terms as to
 5 bond or otherwise as it considers proper for the security of the rights of the adverse party.’
 6 This Rule grants the district court no broader power than it has always inherently possessed
 7 to preserve the status quo during the pendency of an appeal . . . [so] any action taken
 8 pursuant to [Rule 62(d)] may not materially alter the status of the case on appeal.” *Nat.*
 9 *Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (cleaned
 10 up). *See also Prudential Real Est. Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880
 11 (9th Cir. 2000) (“A district court lacks jurisdiction to modify an injunction once it has been
 12 appealed except to maintain the status quo among the parties.”).

13 Here, the relief sought by the FTC is permissible under Rule 62(d) because it would
 14 not materially alter the status of the case on appeal and would maintain the status quo
 15 among the parties. Indeed, the preliminary-injunction order already sets forth a process
 16 under which the Court may grant permission for secured creditors to sell the Individual
 17 Defendants’ assets—it prohibits such sales “except by further order of this Court.” (Doc.
 18 109 at 7.) Thus, granting the FTC’s modification request would not change the status quo
 19 in any meaningful way—the Court has long possessed the power to authorize third parties
 20 to dispose of the Individual Defendants’ assets and the FTC is simply asking the Court to
 21 exercise that power in broad strokes (which is more efficient than requiring an individual
 22 request for each proposed asset sale).

23 Turning to the merits, the Individual Defendants have not raised any legitimate
 24 objections to the FTC’s modification request. The point of the asset freeze was, in part, to
 25 protect the *FTC’s* ability to collect on a future judgment, yet the FTC is now willing to
 26 allow third-party creditors to pursue collection activities even though such creditors may
 27 have superior claims to the underlying assets. The FTC has standing to seek this

28 ¹ *Southwest Marine* refers to Rule 62(c), but that provision has since been recodified
 as Rule 62(d).

1 modification, which is fully consistent with overarching purpose of the asset freeze (which,
 2 again, was to prevent the improper dissipation of the Individual Defendants' assets, not to
 3 interfere with the rights of third-party creditors).

4 As for the Individual Defendants' concern that "nor is there any consideration by
 5 the FTC as to whether these vehicles are subject to exemption or claims by a spouse" (Doc.
 6 599 at 2), the Court wishes to clarify that it is not expanding the collection rights of third-
 7 party creditors beyond whatever rights those creditors may have under federal and state
 8 law—it is simply clarifying the circumstances under which the asset-freeze in this case will
 9 not serve as an impediment to their collection efforts.

10 Finally, as for the Individual Defendants' alternative request to require the net
 11 proceeds of any home sale to be deposited with the Clerk of Court (in lieu of allowing the
 12 FTC to recover the net proceeds in partial satisfaction of the outstanding judgment), this
 13 request is denied without prejudice. The Individual Defendants are effectively making a
 14 Rule 62(b) request for a no-bond stay of enforcement of a money judgment. As this Court
 15 has discussed in previous orders, *see, e.g., Burris v. JPMorgan Chase & Co.*, 2022 WL
 16 3285441 (D. Ariz. 2022), such requests are governed by very specific standards. The
 17 Individual Defendants' cursory stay request does not attempt to address those standards.

18 Accordingly,

19 **IT IS ORDERED** that:

- 20 1. The FTC's motion to modify the asset freeze (Doc. 598) is **granted**.
- 21 2. The asset freeze imposed on Defendants pursuant to the Temporary
 22 Restraining Order (Lead Action Doc. 21, as amended, Doc. 38) and the Preliminary
 23 Injunction (Lead Action, Doc. 109), as recognized in the Permanent Injunctions (Docs.
 24 591, 592) and Judgment (Doc. 596), is hereby **modified** as follows:

- 25 A. Creditors and lien holders with an interest in either real property or
 26 personal property of a Defendant covered by the asset freeze in this
 27 case (*see* Docs. 21, 38, 109, 591, 592, 596) may seek approval from
 28 the FTC to exercise their rights as to frozen assets. This includes, but

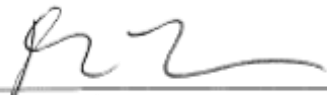
1 is not limited to (i) real property located at 719 Laurelwood Circle,
2 Bowling Green, KY 42103; (ii) real property located at 229 Stable
3 Way, Nicholasville, KY 40356; and (iii) personal property located at
4 either of the above addresses as well as at 21178 Ponte Vista Circle,
5 Boca Raton, FL 33428, and at Space Center Storage in Lexington,
6 KY.

7 B. The FTC may provide its written consent to creditors and lien holders
8 to pursue their interests against the real property and personal property
9 of any Defendant covered by the asset freeze. If the FTC provides its
10 written consent, the subsequent exercise of such creditors' rights,
11 including but not limited to by foreclosure, shall not constitute a
12 violation of the asset freeze.

13 C. Notwithstanding anything in this Order, the asset freeze shall remain
14 in place for any net proceeds that otherwise would be due Defendants
15 from the sale of Defendants' real property and personal property until
16 Defendants satisfy the Judgment (Doc. 596) in this case.

17 D. Nothing in this Order limits the FTC's ability otherwise to obtain
18 frozen assets to satisfy the Judgment (Doc. 596).

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20 Dated this 8th day of December, 2023.

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25 Dominic W. Lanza
26 United States District Judge
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